U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 December 2002

BRB No.: 01-0907

Case Nos.: 2000-LHC-2342; 2002-LHC-2551

OWCP Nos.: 1-149104;

In the Matter of:

MARK A. ROBINSON
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

Appearances:

Scott N. Roberts, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer/Self-Insurer

Before: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER ON REMAND - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on August 28, 2000 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

BACKGROUND

This Administrative Law Judge, by **Decision and Order Awarding Benefits** dated July 24, 2001, concluded that Mark A. Robinson

("Claimant" herein) had sustained a work-related injury in the course of his maritime employment at the Quonset Point Facility and at the Groton, Connecticut shipyard of the Electric Boat Corporation ("Employer") and Claimant was awarded, **inter alia**, benefits for his temporary total disability beginning on August 24, 1999 and continuing to the present and **in futuro** until further **ORDER** of this Court.

The Employer timely appealed from such award and the Benefits Review Board, **by Decision and Order** issued on August 22, 2002, reversed, vacated and remanded the award to this Administrative Law Judge with "specific instructions ... regarding review of the evidence of record."

In view of certain aspects of the Board's decision and as the decision is non-published and for ease of reference by the parties and reviewing authorities, I shall insert the most pertinent parts therefrom at this point.

"Claimant worked as an outside machinist for employer at both its Groton, Connecticut, and its Quonset Point, Rhode Island, facilities between 1979 and 1999 except for a three-year period in the early 1980s. In approximately 1985 or 1986, Claimant was diagnosed with diabetes. Over the next 13 years, Claimant's diabetic condition worsened significantly, as he developed, among other things, peripheral vascular disease, Meniere's disease, retinopathy, polyneuropathy, and loss of feeling in his upper and lower extremities, and he had a full mouth extraction. Cl. Ex. 13. As of August 21, 1999, Claimant could no longer perform his duties, having been diagnosed as being industrially blind. Cl. Ex. 3. Claimant filed a claim for benefits, contending his working conditions aggravated his diabetic condition, rendering him permanently totally disabled. Specifically, he argues that the varying degrees of physical activity of his job and his frequent inability to take the allotted breaks during the course of his shift made it difficult for him to monitor and regulate his diabetic condition.

"The administrative law judge found that Claimant established a **prima facie** case for invocation of, and employer presented substantial evidence rebutting, the Section 20(a), 33 U.S.C. §920(a), presumption connecting Claimant's condition and his employment. Decision and Order at 14. After evaluating the evidence as a whole, the administrative law judge credited Claimant and his treating physician and found that Claimant's work aggravated his diabetic condition. **Id**. at 23-24. He awarded Claimant temporary total disability benefits, medical benefits and interest, and he granted Employer a credit for benefits paid to Claimant for his

other work-related injuries.[1] **Id**. at 33-34. Employer appeals the decision. Claimant has not responded.

"Employer contends the administrative law judge erred in finding that Claimant's working conditions aggravated his diabetic condition.[2] Specifically, it argues that the administrative law judge improperly introduced evidence on his own motion, relied on evidence not admitted into the record, failed to independently review the evidence by adopting a portion of Claimant's brief into his decision, gave an invalid reason for giving greater weight to Claimant's treating physician over its expert. and set forth an incorrect statement of law regarding Section 20(a) rebuttal. For the following reasons, we must vacate the administrative law judge's decision and remand the case for reconsideration.

"Initially, we reject Employer's argument that the administrative law judge erred in reciting the standard for rebutting the Section 20(a) presumption and that this error called into question his evaluation of the record as a whole. **Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981); **see also US. Industries/Federal Sheet Metal, Inc. v. Director, OWCP**, 455 U.S. 608, 14 BRBS 631 (1982). Once the Claimant establishes a **prima facie** case, as here, Section 20(a) applies to relate the injury to the employment, and the Employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by the employment. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); **Bath Iron Works Corp. v. Director, OWCP [Shorette]**, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); **see also American Grain Trimmers v. Director, OWCP** is [Janich], 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (en banc), cert. denied, 120 S.Ct. 1239 (2000); **Gooden v. Director, OWCP**, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); **O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000). If the Employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the Claimant bearing the burden of persuasion. **Universal Maritime Corp. v. Moore**, 126 F.3d 256,31 BRBS 1 19(CRT) (4th Cir. 1997); **see also Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

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[1]Employer paid Claimant compensation for work-related hearing loss and work-related injuries to his hands and right shoulder. Emp. Exs. 9-11.

[2]Employer also contends that Claimant's diabetes is not an occupational disease. As the administrative law judge specifically agreed that diabetes is non-occupational, Decision and Order at 21, there is no dispute on this point.

"In this case, the administrative law judge set forth the appropriate law for invoking and rebutting the presumption and for reviewing the evidence as a whole. However, he also misstated the law by stating at one point in his discussion of various legal authorities that Employer was required to "rule out" any connection between Claimant's work and his disability in order to rebut the Section 20(a) presumption. This error is harmless for two reasons. Decision and Order at 12. First, the administrative law judge also discussed at length **Shorette**, 109 F.3d 53, 31 BRBS 19 (CRT), a decision issued by the United States Court of Appeals for the First Circuit which held that Employer need not "rule out" any possible connection but need only present substantial evidence that Claimant's condition is not work-related. The administrative law judge clearly stated that the law makes it unnecessary for an Employer to "rule out any possible causal relationship[.]" Decision and Order at 11. Further, in determining that Employer "introduced substantial evidence severing the connection" between Claimant's condition and his employment, the administrative law judge applied the proper standard, correctly finding that Employer rebutted the Section 20(a) presumption and that the presumption fell out of the case. **Id**. at 14. As the presumption was rebutted, any errors the administrative law judge made in his general statements regarding legal precedents, or in stating he rejected Employer's arguments on rebuttal, were harmless. **Bath Iron Works Corp. v. Director, OWCP [Harford]**, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); **Coffey v. Marine Terminals Corp.**, 34 BRBS 85 (2000). Moreover, we reject Employer's assertion that the administrative law judge's statements of law regarding rebuttal of the presumption somehow affected his evaluation of the record evidence as a whole, as this allegation is not supported by the administrative law judge's discussion of the evidence.

"Next, Employer contends the administrative law judge's decision gives the appearance of bias for Claimant. It argues he erred in relying on evidence not submitted into the record, and on evidence admitted on his own volition, to create negative inferences as to Employer's motives. In particular, Employer challenges the administrative law judge's interpretation of its Safety Award Program, questioning the relevance of the program to the case, **and his reliance upon testimony heard in other cases**. For the reasons that follow, Employer's contentions have merit, and we will therefore remand the case for further consideration. (Emphasis added)

"It is axiomatic that all evidence must be formally admitted into the record at the hearing before the administrative law judge and that he may not issue a decision based on evidence not formally admitted. 5 U.S.C. §556(e); **see, e.g., Williams v. Hunt Shipyards, Geosources, Inc.**, 17 BRBS 20 (1985); 20 C.F.R. § 702.338. The administrative law judge also may permit the submission of evidence not previously presented to him; however, he must afford the parties a reasonable chance to respond to such submission. 20

C.F.R. § 702.336, 702.338, 702.339. In this case, the administrative law judge twice stated he heard testimony in recent proceedings which confirmed for him the verity of Claimant's claims regarding his inability to attend to his diabetic condition while at work. The administrative law judge also admitted evidence **sua sponte** (relating?) to Employer's Safety Award Program, whereby employees without work injuries would receive a safety bonus of $175. ALJ Ex. 1. (**sic**) Relying on this evidence, the administrative law judge inferred that Employer discouraged visits to the yard hospital by emphasizing the requisite recording of the event with the appropriate government agency and/or the derogatory labels attached to those employees who feel the need to go to the yard hospital. Thus, he concluded, Employer's safety incentive program and its work tactics were concerted efforts to discourage the proper reporting and treatment of injuries. Decision and Order at 24. Based on this perception of Employer's motives, the administrative law judge discredited the testimony of three of Employer's witnesses who all testified that Claimant could have taken a medical break without any repercussions but that Claimant had not requested accommodations to treat his illness. **Id**. at 24; see Emp. Exs. 18 at 14-16, 18,25 at 6-7; Tr. at 151-152, 159.

"Initially, it is unclear whether the parties were given an opportunity to respond to the introduction of evidence of Employer's Safety Award Program after it was submitted. While Claimant did not address the evidence in his post-hearing brief, Employer questioned the relevance of it to the case at bar in light of the absence of evidence establishing that Claimant knew of, and was affected by, the program, or that the program affected the general desire of employees to go to the yard hospital. **As the administrative law judge's decision to discredit Employer's witnesses was based at least in part on the testimony he recalled from other hearings, in conjunction with his interpretation of Employer's motives behind the institution of the Safety Award Program, his decision was affected by evidence not properly admitted into the case and therefore must be vacated.** On remand, the administrative law judge must confine his evaluation to, and base his reasons on, only the evidence of record. **Where the administrative law judge introduces evidence on his own, it must be served on the parties and they must be permitted an opportunity to respond**.[3] While the administrative law judge is permitted to draw his own inferences and conclusions, they must be based on substantial evidence properly admitted into the record. 5 U.S.C. §556(e); **Williams**, 17 BRBS 32; **Ross v. Sun Shipbuilding & Dry Dock Co**., 16 BRBS 224 (1984); 20 C.F.R. §702.338. (Emphasis added)

"Employer also argues that the administrative law judge erred

[3]I agree completely with the Board on this highlighted language and that is exactly what I did, as shall become apparent below.

by adopting a portion of Claimant's post-hearing brief as his explanation for giving less weight to Employer's expert, Dr. Hare. As Employer alleges, from the bottom of page 21 to the top of page 23 of the administrative law judge's Decision and Order, the administrative law judge inserted, nearly word for word, that part of Claimant's brief discussing reasons for finding Dr. Hare's opinion deserving of little weight. **Compare** Decision and Order at 21-23 with Cl's Post-Hearing Brief at 4-6. Although it is not **per se** error for an administrative law judge to adopt or incorporate verbatim language from a party's pleading, incorporation of factual or legal assertions from a party's brief is impermissible to the extent it indicates a lack of independent review of the evidence by the adjudicator. **Williams v. Newport News Shipbuilding & Dry Dock Co**., 17 BRBS 61(1985). In this case, **while the administrative law judge did discuss both expert medical opinions and the testimony as to Claimant's duties**, the portion of the brief adopted by the administrative law judge gave less weight to Dr. Hare's opinion on the basis that he was less familiar with the duties of Claimant's job as described by Claimant and Mr. Doucette, his foreman at Groton, whose testimony was described as "almost exactly on point with that of Ms. Robinson...." Decision and Order at 21. As we have discussed, however, **the administrative law judge's credibility determinations regarding Claimant's work are undermined by his reliance on facts not in evidence in this case**. In addition, **he did not consider relevant distinctions** between Mr. Doucette's and Claimant's testimony.[4] On these facts, we cannot affirm the administrative law judge's decision to give less weight to Dr. Hare's opinion. (Emphasis added)

"Claimant worked the second shift, and his supervisor testified that was a 3:30 p.m. to midnight shift, and that there were two breaks plus lunch during that time. Emp. Ex. 18. Further, Claimant's job was described as very strenuous at times, but that depended on the daily assignments. Emp. Ex. 25. Claimant's job could entail duties such as filling out paperwork, installing or repairing machinery on new submarines, repairing machinery on completed submarines at different work sites, and working with hand tools or large machines. Claimant testified that these jobs could continue for weeks or change hourly, resulting in changes in his level of physical activity. Tr. at 32, 51, 61. Claimant testified that it was against work rules for him to bring food or equipment for insulin injections on board the submarines and that he had to leave the work site to go to snack machines for food or to his locker or the yard hospital to take his insulin injections. Claimant testified that after Mr. Doucette or another foreman raised an issue regarding how to charge the time he spent on trips to the yard hospital, he started taking care of his sugar "on the side" at his locker instead of "creating a problem" by specifically

[4]However, I do disagree with the Board on that alleged failure on my part as no such failure took place.

asking for time to go to the yard hospital. Tr. at 47-48. In contrast, three supervisors for Employer, including Mr. Doucette, stated that employees in general received breaks, that it was not a problem for Claimant to take a break for food or to check his blood sugar, and that the company worked with individuals who were diabetic. Emp. Ex. 18,25; Tr. at 119-159.

"Dr. Hare, the Director of the Joslin Diabetes Center in Massachusetts and an associate clinical professor of medicine at Harvard University, understood Claimant's job to be a second shift position where he was entitled to two breaks plus lunch during the shift, which the doctor said should be sufficient to regulate his blood sugar level. Dr. Hare knew that Claimant worked with heavy machinery and that Claimant's physical activity in his job could be inconsistent, and he also understood Claimant to have worked long hours at two jobs. Emp. Exs. 20, 23 at 20, 28, 32, 38; **see also** Emp. Exs. 18 at 7-8, 25 at 4; Tr. at 132 (statements from supervisors). Although Dr. Hare also stated that he thought Claimant worked in a machine shop, Dr. Hare's description is very close to Claimant's work situation as described by Employer's witnesses. Dr. Hare believed that Claimant's job did not contribute to the deterioration of his condition. Rather, Dr. Hare stated that Claimant should have considered controlling his diabetic condition as his first job and that working the second shift is in itself not detrimental to his health.[5] Dr. Hare acknowledged that Claimant's level of physical activity could change on the job and that this could cause a potential problem, but he stated that the breaks allowed Claimant sufficient opportunity to adjust his intake of food and medication and that he could adjust either before or after the physical exertion, as it is the average over a period of time that is most important. Emp. Ex. 23.

"Dr. Alessandro, a general practitioner and Claimant's treating physician since 1997, whose opinion the administrative law judge gave greater weight, Decision and Order at 23,[6] was under the impression that Claimant worked the third shift, but his opinion did not change when he was told it was the second shift. He also stated that Claimant mentioned outside work with hand-powered tools, that Claimant worked more than one job, and that Claimant was not making the necessary adjustments to regulate his blood

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[5]Dr. Hare stated that shift work is more of a concern when the employee seeks to participate in both day and nighttime activities and is not on a regular schedule. Emp. Ex. 28 at 50.

[6]Contrary to Employer's contention, the administrative law judge did not credit Dr. Alessandro by applying a rule favoring the treating physician. Thus, the issue of "blind application of the treating physician rule" is not before us here.

sugar level when he was at work. Cl. Exs. 2, 13 at 13, 31, 40, 60, 68, 75-77. Dr. Alessandro felt that Claimant's job played a role in Claimant's deteriorated condition, in part because Claimant allowed it too, but also because the changing activity levels of the job made it difficult for Claimant to control his blood sugar level. He said that being on a schedule that is different than the body expects, **i.e.**, working until late at night and having differing levels of activity, made monitoring his blood sugar and making the necessary adjustments difficult. Cl. Ex. 13.

"Drs. Alessandro and Hare had a similar knowledge of Claimant's duties but differing views of the flexibility he was accorded for food and insulin intake and divergent opinions on the effect the varying activity levels of his work had on his condition.[7] Moreover, while Claimant's testimony and that of Employer's supervisors is in agreement on many points, this evidence presents different views of Claimant's ability to leave his work site to manage his diabetes. Thus, while the administrative law judge could find Mr. Doucette's testimony was in accord with Claimant in describing the nature of the work, his testimony contrasted with Claimant's view of the flexibility accorded him in taking breaks. In addition, Mr. Doucette denied raising Claimant's work breaks to go for snacks or to the yard hospital as a timekeeping issue. **It is clear that the administrative law judge's evaluation of the credibility of Employer's witnesses and the weight to be given the medical experts was affected by the administrative law judge's reliance on information about Employer which was not in the record**. Decision and Order at 23-24. This case must therefore be remanded for reconsideration of the credibility of witnesses and the weight accorded the evidence based solely on the record. (Emphasis added)

"Finally, Employer requests that the case be assigned to a new administrative law judge on remand. In view of our specific instructions to the administrative law judge regarding review of the evidence of record, we decline to take this action."

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[7]The administrative law judge also stated he was relying on the opinion of Dr. Browning, an orthopedic surgeon who saw Claimant for orthopedic problems. Dr. Browning diagnosed Claimant with hand-arm vibration syndrome related to his use of power tools and opined that this impairment was made worse by his pre-existing diabetes. Cl. Ex. 11. **He did not believe Claimant's hand-arm vibration syndrome worsened his diabetes, Id.** at 25-26, and his opinion thus does not support the administrative law judge's conclusion regarding aggravation.

That is not what Dr. Browning opined in his report and deposition testimony, as further discussed below.

"Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion."

McGRANERY, J., concurring and dissenting:

"I concur in the majority's determination that the administrative law judge's Decision and Order - Awarding Benefits must be vacated because of his reliance on evidence he has received in other cases to discredit Employer's witnesses. **See In re Boston's Children First**, 244 F.3d 164 (1st Cir. 2001); **United States v. Chantal**, 902 F.2d 1018 (1st Cir. 1990). I also concur in the majority's determination that the administrative law judge properly applied the applicable law.

I respectfully dissent from the majority's implication that the administrative law judge erred in quoting at length from Claimant's brief, because the record does not support a finding that he failed to exercise independent judgment in his review of the record. See **Williams v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 61(1985). The extensive use of quotation did not result in the omission of any relevant fact in Dr. Hare's testimony. I also dissent from the majority's assertion that the administrative law judge did not discuss the relevant distinctions between Mr. Doucette's testimony and Claimant's. **I believe, however, that because the administrative law judge has perceived the evidence in the instant case through a lens colored by evidence presented in other cases, his decision is fatally tainted. Accordingly, I join in the majority's order to vacate the administrative law judge's decision."** (Emphasis added)

EVIDENTIARY ISSUES

I first would like to deal with those portions of the Board's decision highlighted in boldface type as those statements are clearly erroneous and do not contain the usual qualifying language utilized by the Board when it decides to reverse a judge's decision and then searches for reasons to justify its decision.

First of all, the Board accuses me of basing my decision "on the testimony (I) recalled from other hearings, in conjunction with (my) interpretation of Employer's motives behind the institution of the (Employer's) Safety Award Program" and, in the words of the dissenting judge, who "believe(d) ... that because the Administrative Law Judge has perceived the evidence in the instant case through a lens colored by evidence presented in other cases, his decision is fatally tainted."

Even a cursory reading of my decision, in conjunction with a thorough review of this closed record, should lead to the conclusion that the Board's impressions, colored by the misstatements, misrepresentations and innuendo in the Employer's brief, especially its tenor, do not correspond with reality.

In my twenty-four (24) plus years as an Administrative Law Judge I have always been guided by the formal regulations governing the hearings conducted by the Office of Administrative Law Judges. Most noteworthy is 20 C.F.R. § 702.338 wherein it is stated:

> **§ 702.338** Formal hearings; general procedures.
>
> All hearings shall be attended by the parties or their representatives and such other persons as the administrative law judge deems necessary and proper. **The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the administrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing or, at any time, prior to the filing of the compensation order, reopen the hearing for the receipt of such evidence.** The order in which evidence and allegations shall be presented and the procedures at the hearings generally, except as these regulations otherwise expressly provide, shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing. (Emphasis added)

Moreover, Section 702.339 provides:

> **§ 702.339 Formal hearings; evidence.**
>
> In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and these regulations; **but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties**. (Emphasis added)

In this regard, **see Burley v. Tidewater Temps, Inc.,** 2002 WL 199184, BRB No. 01-0405 (January 17, 2002). While this decision is non-published, I have cited this decision because, unlike the case at bar, the Board there does discuss 20 C.F.R. §§ 702.38 and 702.339, and this case illustrates the risk of reversal the judge faces when the closed record does not contain all relevant, material and not unduly cumulative evidence.

Those regulations, especially the boldfaced portions, are very specific, clear and unambiguous and entrust this presiding judge with specific directions and a mandate that I must follow or risk

reversal by reviewing authorities.

During my years as an Administrative Law Judge I have routinely asked questions of witnesses and their counsel after both counsel had completed their questioning. While I am not as activist a judge as some of my colleagues, I do not sit on the bench quietly like the proverbial "potted plant", to quote the now legendary observation of Attorney Brendan Sullivan at a congressional hearing in the District of Columbia. Each of us has our own style.

To clear up any misimpression I absolutely did not rely on any non-record evidence in my decision, contrary to the Employer's misstatements. I absolutely did not rely on any information, evidence or testimony from any other case not specifically identified either in my orders or decision, as can clearly be seen by the following documents:

As already noted, the hearing was held on August 28, 2000 **AND WHILE THE RECORD WAS STILL OPEN FOR RECEIPT OF POST-HEARING EVIDENCE,** on November 27, 2000 I issued the following **ORDER** (ALJ EX 7A):

ORDER

TO: Counsel for the Respective Parties (See Below)
RE: Mark A. Robinson v. Electric Boat Corp.
Case No. 2000-LHC-2342
OWCP No. 1-149104

The parties are advised that the attached documents were filed by the parties in **Brian P. Chesna versus Electric Boat Corporation**, 2000-LHC-606, OWCP No. 1-146398. The parties are advised that I propose to admit those documents into the record of **Mark A. Robinson versus Electric Boat Corporation**, 2000-LHC-2342, OWCP No. 1-149104, as they are relevant and material to the issues presented herein. **The parties shall have (at least) fourteen (14) days to file any comments on these business records of the Employer.**[8] (Emphasis added)

DAVID W. DI NARDI
Administrative Law Judqe

SERVED UPON:

(X) Murphy & Beane, ATTN of: Peter B. Quay, Esq. (w enc.)
(X) Others as follows: Scott N. Roberts, Esq. (W.enc.), Robert C. Jeffrey, Esq. (W.enc.), McKenney, Jeffrey & Qui9ley, One State Street,

[8]The documents attached to ALJ EX 7A were admitted into evidence in my initial decision herein.

Providence, RI 02908

As can be seen all counsel were served those documents that were then part of the record in one other case, and not several other cases as alleged by the Employer.[9] The claim of Brian P. Chesna was then pending before me; the Respondent there was the same Employer as is involved in the claim filed by Mark A. Robinson. The Employer was represented by the same law firm in both cases. In fact, it was the Employer who offered those documents in that case, as can be seen by my identifying marks. However, Mr. Chesna was represented by another law firm.

Those documents (1) were and still are **OFFICIAL BUSINESS RECORDS OF THIS Employer**, (2) are relevant and material to the issues presented by the Claimant and (3) should have been disclosed by the Employer to Claimant's counsel before the formal hearing or, at least, after the hearing once Claimant testified as to his reluctance to go to the Yard Dispensary **unless absolutely necessary.** That Claimant's counsel did not specifically request those documents, **in haec verbis**, during pre-hearing or post-hearing discovery is no defense. Discovery permits obtaining documents that will lead to documents that are relevant and material to the issues, and that are not unduly cumulative, the standard of admissibility in these proceedings.[10]

However, as those exculpatory documents were not furnished to the Claimant and, as three (3) months had elapsed, I decided that those documents must be furnished to the parties as they were clearly relevant and material. I did so on November 27, 2000 (ALJ EX 7A) and the parties were given at least "fourteen (14) days to file any comments on these business records of the Employer." (**Id.**)

The parties were given as much time as needed to file post-hearing evidence and this judge gave the parties additional time to file such evidence. In this regard, the Employer requested extensions of time by letters dated January 19, 2001 (ALJ EX 8), February 23, 2001 (ALJ EX 9) and March 8, 2001. (ALJ EX 10) Claimant, by letter dated April 5, 2001, requested a short extension of time to file his post-hearing brief. That request was granted and the Employer was given an additional two (2) weeks to

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[9]Any implication in my decision that I was referring to more than the Chesna claim was clearly not intended, is unfortunate and was due to imprecise language in the editing and drafting process.

[10]In fact, some academics have described discovery as a "legal fishing expedition," the purpose of which is to obtain documents that might lead to relevant and material evidence that can be admitted into evidence at the trial.

file a reply brief. (ALJ EX 11)

Post-hearing the Employer filed on November 13, 2000 the September 18, 2000 report of Dr. Forman (RX 13), on January 25, 2001 the October 24, 2000 deposition testimony of Dr. McKee (RX 17), on January 25, 2001 the deposition testimony of John T. Hickey (RX 18), on February 15, 2001 the January 31, 2001 report of Dr. Hare (RX 20) and on March 8, 2001 the deposition testimony of Dr. Hare (RX 23) and Henry A. Doucette. (RX 25)

As can be easily gleaned from the above, the Employer has had actual knowledge of the documents related to the **Employer's Shipyard Employee Recognition Program and its Safety Recognition Program** within a day or two after November 27, 2000. (ALJ EX 7A) Most noteworthy is that the Employer was able to examine its representatives on those documents at their subsequently taken depositions. Moreover, the Employer was able to brief those documents in its post-hearing brief. Furthermore, the record herein was not closed until April 20, 2001, almost five (5) months after the Employer received the documents contained as part of ALJ EX 7A. Thus, it is obvious that the Employer had ample opportunity to respond to its own business records, and did, in fact, do so.

What is most noteworthy, and this point was completely overlooked by the Board, is the fact that these documents are official business records of the Employer. They are not some secret documents obtained from a third party and sprung by surprise and without any notice on the Employer in this judge's decision. These documents will be more fully discussed below in the section dealing with whether or not Claimant has established a work-related injury.

As I have already noted above, these documents are most relevant and material herein and certainly are not unduly cumulative, the sole standard of admissibility in proceedings under the Act. These documents should have been furnished to Claimant as part of discovery herein. These documents, however, were not furnished to the Claimant.

As the Employer failed to provide Claimant with reasonable and necessary medical care and treatment relating to his work-related injury, he filed an additional claim and this claim was identified by OWCP with the same claim number (1-149104) and by the Office of Administrative Law Judges as 2002-LHC-2551. While one of my colleagues issued a Notice of Hearing relating thereto and once the record of 2000-LHC-2342 was docketed at the Office of Administrative Law Judge, that notice was cancelled and, in accordance with procedure at Office of Administrative Law Judges, the claim was reassigned to this Administrative Law Judge as I am still available to the Office of Administrative Law Judge and as the claim for medical benefits related to issues that already had been resolved by me in the first decision and now again in this decision on remand. Those issues are consolidated herein and I will now resolve all of the issues in light of the Board's mandate.

The parties have now advised that this medical benefits claim has been resolved.

The Findings of Fact and Conclusions of Law made in my July 24, 2001 **Decision and Order Awarding Benefits,** to the extent not disturbed by the Board, are incorporated herein by reference and will be reiterated herein solely for purposes of clarity and to deal with the Board's "specific instructions."

On the basis of the totality of this closed record and having observed the demeanor and heard the testimony of credible witnesses, except as noted below, and keeping in mind the Board's "specific instructions" herein, I make the following:

Additional Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148-9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608,

615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence rebutting the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Woris Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First

Circuit, in whose jurisdiction this case arises, as Claimant has worked both at Quonset Point and Groton, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56, 31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP (Harford)**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work). To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to rebut the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's credible statements to establish that he experienced a work-related harm, and as it is undisputed that working conditions

existed that could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier offers testimony that negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich**

Collieries, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to the employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to negate the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his diabetes, was aggravated by and/or resulted from working conditions at the Employer's shipyard. The Employer has introduced substantial evidence negating the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of this closed record.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act.

Gardner v. Bath Iron Works Corporation, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar, Claimant has offered the progress notes (CX 2) and deposition testimony (CX 13) of Joseph Alessandro, D.O., Claimant’s treating physician since October 24, 1997, wherein the doctor, after the usual social and employment history, his review of Claimant’s diagnostic tests and laboratory results and the numerous physical examinations since that time, testified that it is “not uncommon for people who work odd shifts to have problems with their diabetes,” that Claimant’s attacks of hypoglycemia (**i.e.**, low blood sugar) can be alleviated by a quick intake of sugar in the form of orange juice, that over the years his sugar

level has been “moderately controlled,” that he has had insulin injections for many years, that his decreased sensation in his lower extremities “is peripheral neuropathy” and that diabetes does cause a lack of healing “because diabetes does damage to the smaller blood vessels.” Dr. Alessandro further testified that it was “more difficult to control your blood sugar if you’re burning different amounts of calories a day” because of inconsistent job demands and the risk of hypoglycemia, that the best way to control diabetes is to have a fairly regular schedule, be “able to check your sugars more often and taking insulin on a sliding scale” and that Claimant continued to complain of non-healing wounds and decreased sensation, symptoms of which led the doctor to suspect peripheral vascular disease and to refer Claimant to Dr. Baum, a general and vascular surgeon, for further evaluation. (CX 13 at 3-29)

Dr. Alessandro warned Claimant numerous times that it was very risky for a diabetic to eat just once or twice each day because of his work schedule because of the risk of hypoglycemia or diabetic shock. As of July 6, 1999, Dr. Alessandro diagnosed Meniere’s disease, **i.e.**, “a problem in the inner ear which can give you dizziness, vertigo and also ringing, tinnitus,” a condition caused by “(e)xcessive fluid in the inner ear.” That condition could cause problems with working because “people have problems getting up out of chairs or being nauseous, vomiting all the time” and that is why the doctor urged Claimant not to drive or operate any machinery or climb ladders or do any other dangerous activity. Claimant’s diabetic retinopathy, one of the complications of diabetes that could result in loss of vision, is being treated by Dr. Tarabisby. Claimant’s dizziness or a sense like being in a fog “is no doubt related to metabolic disturbances probably due to high blood sugar.” (**Id.** at 30-49)

Claimant’s “severe pain in his legs,” especially at night, is due to diabetic neuropathy and was treated with Elavil, but as “there’s already damage to the nerves,” that will probably not be reversed, the doctor remarking, **“It’s just sad ... when he came in three years ago, he didn’t have half the problems” he now has. As of January 19, 2000, according to Dr. Alessandro, “At this point the patient is unable to do simple tasks secondary to poor vision and PVD,“ i.e., peripheral vascular disease.** (**Id.** at 49-61) (Emphasis added)

In response to intense cross-examination by Employer’s counsel (**Id.** at 61-87), Dr. Alessandro forthrightly reiterated his opinions and he never wavered in his diagnoses and in Claimant’s inability to return to work because of the irregular work schedule because “the bodies (sic) made so that it’s supposed to sleep during the night” and a worker on second or third shift cannot do so. (**Id.** at 69) Claimant cannot return to work because he is “industrially blind,” a label given him by his ophthalmologist based upon his values on the Snellen eye test. (**Id.** at 78)

Claimant's Quonset Point/Electric Boat Dispensary Records are in evidence as CX 3 and the treatment records of Dr. Ramsey Tarabisby, relating to his treatment of Claimant between May 29, 1998 and October 12, 1999, are in evidence as CX 4.

Dr. S. Pearce Browning, III, a specialist in orthopedics and the hands, examined Claimant on September 28, 1998 and the doctor, after the usual social and employment history, his review of Claimant's diagnostic tests and the physical examination, concluded that Claimant "has considerable in the way of damage on both the neuromuscular side and the vascular side," that his neuropathy could reasonably be rated at thirty-five (35%) percent of each upper extremity, that twenty (20%) percent thereof is due to the bilateral hand/arm vibration syndrome and to the diabetes and "that he is going to get progressively worse with increased neuropathy, and the reason for this is his diabetes." (CX 5 - CX 8) Dr. Browning forthrightly, probatively and persuasively reiterated his opinions at his February 3, 2000 deposition. (CX 11)

Dr. Neri J. Halzer, an otolaryngologist, treated Claimant's Meniere's disease between November 19, 1997 and September 22, 1999. (CX 10)

The Employer has offered the September 18, 2000 report of Barr H. Forman, M.D., of Metabolism Associates, P.C. (RX 13) wherein the doctor, after the usual social and employment history, his review of Claimant's diagnostic tests and the physical examination, gave the following report:

"My impression is that Mark has poorly controlled diabetes. He has been noncompliant in the past with medical follow-up and has recently stopped drinking beer, but continues to smoke. Lab work has returned indicating continued proteinuria of a significant degree and despite not working still has quite poor glucose control making it difficult for me to ascribe his working conditions as causal in his poor control. He shows signs of retinopathy and neuropathy. **The question as to his inability to eat and test appropriately while at work has been raised and is difficult for me to specifically indicate whether or not this is contributory at this point in time based on the information or the exam of today.** (Emphasis added)

In an "E" mail of October 11, 2000 Dr. Forman further stated (RX 14):

> "Diabetes can have a variable course independent of Mr. Robinson's allegations. **Stress, erratic eating, unpredictable work shifts and exertion each can alter glucose levels**. Smoking directly worsens diabetic complications and alcohol can alter glucose levels. Complications can occur even in well controlled diabetes. I am, therefore, unable to specifically assign causality

> to Mr. Robinson's claim that work conditions at Electric Boat worsened his diabetic control **which is possible**. Moreover, as the latest hemoglobin AIC test still indicates very poor control despite Mr. Robinson no longer working at E.B., the causality issue would tend to point to factors other than his employment. I trust that you will honor my request to dissociate myself from any further involvement in this evaluation."[11] (Emphasis added)

The Employer has offered the deposition testimony of Henry A. Doucette (RX 25) and Mr. Doucette, who works at the Groton shipyard as an Area Superintendent, second shift and who has worked for the Employer for twenty-five years, testified that he was aware of Claimant's diabetic condition since at least the late 1980s, that he suggested to the Claimant that he go to the Yard Hospital for his insulin injections, that the Employer had "no policy against anyone taking care of their own personal medical needs" and that he was "not aware of any special privileges being asked for" by the Claimant. According to Mr. Doucette, the work of an outside machinist "can be very strenuous or physical" and that the work sometimes can be unpredictable and each day there could be different assignments, depending upon the Employer's needs and the particular status of the boat, Mr. Doucette remarking that an outside machinist is "going to get potentially dirty, sweaty, work hard." Mr. Doucette also admitted that for safety reasons there are always two employees operating the boring bar (RX 25 at 4-14) and that he, as a supervisor, would make reasonable accommodation for Claimant's medical needs. (RX 25 at 17-23)[12]

John T. Hickey, who currently works as an outside machinist foreman at Quonset Point and who also has worked for the Employer for twenty-five years, testified that Claimant was hired at Quonset

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[11]In all my years as an Administrative Law Judge, I have not seen that last sentence in any matter over which I have presided. One can only imagine why the doctor felt it necessary to add that finale to his report. I will leave it to each reader to draw their own inferences. A cynical person could infer that the doctor was sent "signals" as to what his conclusion on causality should be. Otherwise, there is no need for the doctor to request, in writing, that he no longer be involved "in this evaluation."

[12]While two members of the Board accuse me of not discussing certain aspects of the testimony of Mr. Doucette, I did, in fact, discuss his testimony and the ramifications thereof on pages 18, 21 and 23 of my decision. I do note that Appeals Judge Regina C. McGranery "dissented from the majority's assertion that the Administrative Law Judge did not discuss the relevant distinctions between Mr. Doucette's testimony and claimant's."

Point in July of 1998, that he supervised Claimant for two short periods of time on second shift, **i.e.**, from 3:30 to 12:00 midnight, that these employees have two ten-minutes breaks and a thirty minute lunch period and that he was not aware of Claimant's diabetes until October of 1999. (RX 18 at 5-9)

The parties deposed Eugene B. McKee, M.D., on October 24, 2000 (RX 17) and the doctor, who has been the Employer's Medical Director at Quonset Point for fifteen years or so, testified that he has reviewed Claimant's medical file relating to his visits to the Yard Dispensary, that Claimant did not request any kind of accommodation or change in his work shift, that he has made accommodations in the past for individuals with personal or medical needs, upon medical documentation, that Claimant's July, 1998 pre-placement physical examination did disclose his diabetic condition and the medication prescribed therefor and that Claimant was not placed on any work limitations. (RX 17 at 4-11)

Dr. McKee agreed that working first shift, with regular working, eating and sleeping hours, would enable a diabetic to control his diabetes much better. (RX 17 at 14-15) I do note that somehow Dr. McKee was not shown any of Dr. Alessandro's medical records relating to his treatment of the Claimant. (RX 17 at 15)

The Employer sent Claimant's medical records to Boston for review at the Joslin Diabetes Center and John W. Hare, M.D., Director, Affiliated Programs, sent the following letter to the Employer's counsel on January 31, 2001 (RX 20):

"I have reviewed the materials that you sent to me which included inpatient and outpatient medical records and letters from consulting physicians.

"In your letter of September 27, 2000 you posed four questions.

1) Did it matter that he worked the second shift at Electric Boat? It did not. Because of his long day and strenuous work schedule it was incumbent on him to be sure he had good nutrition both in quantity and quality. He was instructed in a 3500 calorie diabetic diet at Lawrence & Memorial hospital in 1989. His dietary instruction specifically took into consideration his long hours and level of physical activity.

2) Did it matter that he usually held a second job (Or first job, given that he worked during the day before going to Electric Boat)? He worked 16 hours a day and commuted to both jobs. It really made no difference as long as he also considered self-management of his diabetes to be his "third job."

3) Did it matter that he had insulin dependent diabetes almost from its onset? Diabetes is generally divided into two types: Type 1 (insulin dependent) and Type 2 (non insulin dependent).

Type 1 diabetes generally occurs before the age of forty, is not associated with obesity and is often without a family history. Although Mr. Robinson was initially treated with oral agents, the expected emergence of insulin dependence in a non-obese young adult soon occurred. Type 2, which is by far the more common, generally occurs after age forty, is associated with obesity and family history.

4) Can his current condition be attributed to the natural progression of aggressive disease? There may be an inherent propensity in some patients to develop complications, but it is quite clear from published data that poor control increases the risk of complications in general and, in particular, visual ones. His poor control was documented by the finding of consistently elevated glycohemoglobin levels. This is a blood test which indicates average control over the past several months. Normal levels are about 4-6%. A higher risk for complications is present if over 8%. The highest risk is present if over 10%, which is what all the values were in the materials you submitted. I also believe that his lack of regular care was a non-specific risk factor. It appears from the record that he was sporadic about seeking care and tended to do so either at employee health or by visiting an Emergency Room. Of note is a letter from his ophthalmologist who says he was 11 months overdue for an appointment. It is now believed that regular examinations before the development of diabetic eye disease, with more frequent visits and treatment if it is present, can prevent blindness in over 90% of patients.

"In summary, Mr. Robinson developed insulin dependent diabetes in 1986. His control was never good, his dietary and self-glucose management was never good and he smoked. These are all risk factors for the development of complications in general and visual complications in particular. The fact that he worked long hours is not an explanation for his complications of diabetes. There is no evidence that Electric Boat in any way inhibited his ability to follow a diet or monitor his blood glucose levels while at work. On the contrary, they knew he had diabetes and were willing to accommodate him."

Dr. Hare reiterated his opinions at his March 7, 2001 deposition (RX 23 at 4-43) and, in response to intense cross-examination by Claimant's counsel, testified that "diet, insulin and exercise is the holy triad in the control of diabetes," that meal size and meal timing are important factors, that a diabetic such as the Claimant should have a break every two hours, that **"the patients that (he) see(s) that have the most difficulty (in controlling their diabetes) are people who work night shifts"** and that Claimant's work activities did not aggravate his poor diabetes control in any way. (RX 23 at 43-63) (Emphasis added)

As noted above, the Employer has offered the report and an "E" mail of Dr. Forman in an attempt to rebut the statutory presumption in Claimant's favor. However, the doctor's opinion actually supports the claim before me because the doctor agreed that **stress, erratic eating, unpredictable work shifts and exertion can alter glucose levels** and that **it is possible** that work conditions at Electric Boat worsened Claimant's diabetic control. (RX 13, RX 14) Moreover, it is obvious that Dr. Forman did not review all of Claimant's medical records and, in fact, refers to no medical records in his 1 ½ page September 18, 2000 report. (RX 13)

The Employer, apparently realizing that Dr. Forman's opinions did not support its continued refusal to accept this claim, then went looking for a medical practitioner who would support its position and the result is Dr. Hare's January 31, 2001 report (RX 20), as well as the doctor's March 7, 2001 deposition testimony. (RX 23) However, the doctor's opinions, as summarized above, do not require a finding in the Employer's favor for the following reasons.[13]

I agree completely with the Claimant that his diabetes is non-occupational in origin. The diabetes is controlled, in part, through medication, through diet and through exertional activity. The dietary demands, are in part, predicated on the level of physical exertion exhibited by the diabetic. (Or anyone else for that matter). The more sedentary one is the less one has to eat. Conversely, the more active one is, the more one has to eat. For the non-diabetic person, if the physical demands are great and the dietary intake is insufficient, then one becomes hungry and one may become weak. There is no physical damage or physical ramification for the inadequate dietary control. This, simply and unfortunately, is not the case of a diabetic. It is important for the diabetic to know what is expected of him in a physical sense. This physical sense of course relates to the non-industrial physical demands one encounters during the day and also relates to the physical demands one encounters at work.

The Claimant testified that it was difficult for him to predict the physical demands of his job and thereby to moderate or

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[13]In my decisions I occasionally adopt portions of the parties' briefs. I do so to expedite the decision, especially when that portion of the brief is well-written and reaches the same conclusions that I have already reached. This does not mean, and no-one can logically or reasonably infer, that I have delegated the decision-making authority to one of the parties. Such adoption is done after careful review of all of the evidence, as well as the opponent's brief on a particular issue. By the way, that is standard practice in state litigation, and is known by every attorney who has ever empaneled a jury in civil litigation.

predict his diet because his job, quite simply, changed frequently. The job changed from shift to shift or sometimes even during the course of an evening at work. The Employer attempted to rebut this claim by Claimant but unfortunately, at least for the Employer, Mr. Doucette's deposition testimony was almost exactly on point with that of the Claimant and goes a long way in supporting the description of the physical demands of his job and the unpredictability of the physical demands of the job at Electric Boat.

As already noted above, the Employer has offered the deposition testimony of Henry A. Doucette (RX 25) and Mr. Doucette, who works at the Groton shipyard as an Area Superintendent, second shift, and who has worked for the Employer for twenty-five years, testified that he was aware of Claimant's diabetic condition since at least the late 1980s, that it was he who objected to Claimant taking insulin by injection at his work site, that he suggested to the Claimant that he go to the Yard Hospital for his insulin injections, that the Employer had "no policy against anyone taking care of their own personal medical needs" and that he was "not aware of any special privileges being asked for" by the Claimant. According to Mr. Doucette, the work of an outside machinist "can be very strenuous or physical" and that the work sometimes can be unpredictable and each day there could be different assignments, depending upon the Employer's needs and the particular status of the boat, Mr. Doucette remarking that an outside machinist is "going to get potentially dirty, sweaty, work hard." Mr. Doucette also admitted that for safety reasons there are always two employees operating the boring bar (RX 25 at 4-14) and that he, as a supervisor, would make reasonable accommodation for Claimant's medical needs. (RX 25 at 17-23)

Claimant testified credibly before me that he was reluctant to go to the Employer's Yard Hospital for his insulin injections and/or to ask for special accommodations because his supervisors discouraged, for various reasons, such visits unless absolutely necessary because such visits, especially work accidents, have to be reported, **inter alia**, to OSHA.

Although Claimant did not testify about the Employer's Safety Program **in haec verbis,** the logical inferences to be drawn from his testimony clearly related, in my judgment, to the Employer's program, and that is precisely why I concluded that those documents (part of ALJ EX 7A) must be in the record. Now let's take a look at the exact program, its exact nomenclature and its ramifications.

ALJ EX 7A contains the following documents in this closed record (as already noted these documents ARE IN EVIDENCE and placed of this closed record):

ELECTRIC BOAT CORPORATION
A GENERAL DYNAMICS COMPANY

December 18, 1998

To: Electric Boat MTC Shipyard Employees
Subject: Electric Boat MTC Shipyard Employee Recognition

Sustaining the Groton shipyard as a premier shipyard workforce is our primary focus.

The path taken to meet this goal has been paved with difficult decisions and actions that strain even the strongest relationships.

Electric Boat continues to face significant challenges. You successfully continue to meet these opportunities, and by this, the shipyard is providing testimony of its dedication, professionalism and commitment to building ships.

Just as difficult times have resulted in difficult decisions, successes must be recognized and celebrated.

Employee safety and good health has (sic) always been of utmost importance. Shipyard worker safety performance in 1998 has continued the positive trend documented in 1997.

Electric Boat management and MTC leadership agree that this continuous improvement will he recognized through a safety performance recognition award of $175.00 to each eligible MTC employee.

This “good news” item reflects our desire to work on your behalf during the difficult times and not miss opportunities to recognize your efforts and contributions.

John P. Casey
Vice President Operations

Safety Awards

1998

- $175 Awards
- All MTC Employees & First Line Supervision in Operations, Material Control, Quality & Nuclear
- Employees had to be on roll as of 12/18/98 and worked 1 hour in 1998

Eligible:

MTC	=	1,956 x $175	=	$342,300
Salaried	=	138 x $175	=	$24,150

Total	2,094	$366,450

Note: Hourly guards not included
Total on roll MTC employees (including Suspense Depts.) as of 11/21/98 = 2,152[14]

ELECTRIC BOAT CORPORATION
A GENERAL DYNAMICS COMPANY

Inter-Office Memo February 13, 1998

To: Safety Recognition Program Participants
Subject: 1997 Safety Recognition Program Results

Injuries incurred at work take a toll on our employees and their families. The human impact of any injury on the worker's physical emotional and financial well being can be devastating. For this reason, Electric Boat Corporation initiated a Safety Recognition Pilot Program with the Metal Trades Council in 1997 as an added incentive to reduce on-the-job injuries.

The results of the Safety Recognition Award Program have been calculated and the performance of the Groton Facility exceeded the established goals. Noteworthy accomplishments include:

- Recordable Injury Rate of 20.8 against an established goal of 24.7
- Lost Workday Injury Rate or 4.9 against a goal of 6.0
- Lost Workday Cases dropped 39 percent from 704 in 1996 to 428 in 1997
- Operations, which accounts 90 percent of the lost workday cases, dropped their Lost Workday Rate from 13.6 to 12.6 and realized a 41 percent reduction in cases from 646 to 383.

In recognition for these significant accomplishments, a **$225.00** award will be given to all eligible MTC employees and First-Line Supervisors in the Operations, Nuclear, Quality, and Material Control areas.

Thank you for your efforts in achieving these results and working safely a number-one priority in 1998. please continue to make working safely a number-one priority in 1998.

John P. Casey VP Operations	Kenneth DelaCruz President Metal Trades Council	Robert H. Nardone VP Human Resources and Administration

$443.250 Total Award

[14]As 1,956 out of 2,152 MTC employees received their $175.00 award, it is obvious that the safety recognition program worked.

ELECTRIC BOAT
BULLETIN

Vol. 11, No. 22

EB, MTC agree to safety incentive

Shipyard employees will receive cash if safety goals are met

Under the terms of an agreement reached between Electric Boat and the Metal Trades Council, bargaining-unit employees will receive cash payments of at least $100 if certain safety goals are achieved for the year.

The goal for the year is to attain an Operations lost workday injury rare (LWIR) of 5.9 percent. If this goal is reached, each eligible employee will receive $100. For each 0.5 percent reduction to the LWIR, each employee will receive an additional $50. For example. if the LWIR rate is 5.4 percent, the total award for each individual will be $150. If the LWIR is 4.9 percent. the award will be $200, and so on.

To be eligible for the award, bargaining-unit employees must work a minimum of 1,000 hours (excluding absences) during the 2000 calendar year and must be on the payroll as of Dec. 1, 2000. Bargaining unit employees laid off before Dec. 1 who worked at least 1,000 hours during the year and employees who retired before Dec. 1 and worked at least eight hours during the year will also be eligible to receive the safety recognition award.

The payments will be made on or before Dec. 22.

“This is another step toward our goal of enabling employees to tangibly share in the success of the company,” said Bob Nardone, VP - HR & Administration. “More important, however, is the goal of making the shipyard a safer place to work. This agreement reinforces our commitment.”

“We want all our talented members to go home to their families in the same condition they came to work,” said MTC President Ken DelaCruz. “If there′s a savings to the company, it′s a good thing that all our members be rewarded. I′m glad we were able to work it out.”

GENERAL DYNAMICS
Electric Boat
75 Eastern Point Road • Groton, CT 06340-4989

Thus, in view of those **OFFICIAL BUSINESS RECORDS** of this Employer, Claimant’s reluctance to go to the Yard Hospital or to ask for special accommodations was a reasonable belief. After all,

he was told, along with all other eligible employees, to limit his visits to the Yard Hospital to qualify for those significant money awards.

I also find and conclude that Claimant made reasonable efforts to control his diabetes but that working second shift as he did, and especially his erratic work schedule and the varying physical demands of his various assignments, made it difficult for him to control his diabetes.

Now let us take a look at the medical evidence in this closed record.

As summarized above, the Claimant treated with Joseph Alessandro of Brooklyn, Connecticut. Submitted into evidence were photocopies of thirteen (13) office visits by Claimant to his treating physician Dr. Alessandro. On page 89 of Dr. Alessandro's deposition transcript, Dr. Alessandro stated: "I know he repeatedly said there were problems eating appropriately when he was working." Additionally, there were two specific references in Dr. Alessandro's notes, **i.e.**, November 25, 1997 and August 3, 1998, whereby Dr. Alessandro specifically indicates that the Claimant's work for the Employer is in part responsible for his dietary non-compliance. It is the dietary non-compliance which resulted in the many physical problems experienced presently by the Claimant, and I so find and conclude.

The Employer attempted to defend the claim by the testimony of Dr. John Hare of the Joslin Diabetes Center. Dr. Hare is an extremely well qualified expert in the area of diabetes and identified himself as the director of the Joslin Center.

However, there were some problems with Dr. Hare's opinion and much of the problem is due to some faulty information upon which Dr. Hare relied in arriving at his opinion. First and foremost, Dr. Hare's dietary information on the Claimant was limited to some caloric information obtained from some old records in 1989 from the Lawrence and Memorial Hospital. Dr. Hare, of course, testified that he thought that type of diet was sufficient for someone like the Claimant. Dr. Hare did go on to say on page 47: "Some people do have daily variations in the caloric intake because of their activity level but there is no reason that I could see that he could not have done that." Dr. Hare went on to testify that he had no job description for the Claimant subsequent to 1989 and it should be pointed out for the record that the Claimant remained employed at Electric Boat until August of 1998 in his physically demanding work, and I so find and conclude. Moreover, Dr. Hare indicated on page 63: "For example, some of my construction worker patients sometimes do have diets that they use differently for more active days versus inactive days. They tend to know what those days are going to be. They know if they've got a job outside, you know that that's what's going to happen."

The problem with Dr. Hare's understanding of the job description is that Dr. Hare apparently did not read Claimant's testimony at trial and apparently Dr. Hare did not read Mr. Doucette's description of Claimant's job at Electric Boat. Dr. Hare apparently was operating under the mistaken impression about Claimant's work schedule as indicated on page 48: "I was told that he had a break, in essence, every two hours. That he came to work, that there was a coffee break or whatever it might be called, then two hours, lunch break, and then another break, this would be late in the evening, I guess, on the second shift. I thought it was significant in that if he had an opportunity to test and make dietary adjustments that frequently, that that alone would be more than sufficient to manage his diabetes."

The problem with Dr. Hare's understanding of Claimant's work is that it is not accurate and the record also establishes, based upon Dr. Alessandro's office notes, that the Claimant was not making these adjustments at work, and that he was unable to do so for a variety of reasons, as I have already noted above. In this regard, **see** the Employer's Official Business Records that are a part of ALJ EX 7A.

There most certainly were conditions, peculiar to the Claimant's employment at Electric Boat, which did aggravate the Claimant's diabetic condition. Specifically, the nature of the employment. The work as a machinist, even as described by the Employer's own expert, Henry Doucette, is very physical in nature. The Claimant would consume a caloric intake which he felt sufficient to protect him at work and then might present himself at work and find that the very nature of the job changed without any notice of the change. The Claimant would then be caught in a situation where he may have consumed too much food anticipating a heavy work load that evening or, alternatively, may not have consumed enough food anticipating that the demands of his job may have been lighter in nature for that particular shift, and I so find and conclude.

Contrasting this description of the job with the type of physical activity the Claimant engaged in around his house, the Claimant testified that he could gauge and control his diet because he controlled his activities and he could predict what he would be doing on a particular day as it related to the maintenance of the family-owned farm.

Dr. S. Pearce Browning, III, a specialist in orthopedics and the hands, examined Claimant on September 28, 1998 and the doctor, after the usual social and employment history, his review of Claimant's diagnostic tests and the physical examination, concluded that Claimant "has considerable in the way of damage on both the neuromuscular side and the vascular side," that his neuropathy could reasonably be rated at thirty-five (35%) percent of each upper extremity, **that twenty (20%) percent thereof is due to the**

bilateral hand/arm vibration syndrome and to the diabetes and "that he is going to get progressively worse with increased neuropathy, and the reason for this is his diabetes." (CX 5 - CX 8) Dr. Browning forthrightly, probatively and persuasively reiterated his opinions at his February 3, 2000 deposition. (CX 11) (Emphasis added) As noted above, the Employer has offered the September 18, 2000 report of Barr H. Forman, M.D., of Metabolism Associates, P.C. (RX 13) wherein the doctor, after the usual social and employment history, his review of Claimant's diagnostic tests and the physical examination, gave the following report:

"My impression is that Mark has poorly controlled diabetes. He has been noncompliant in the past with medical follow-up and has recently stopped drinking beer, but continues to smoke. Lab work has returned indicating continued proteinuria of a significant degree and despite not working still has quite poor glucose control making it difficult for me to ascribe his working conditions as causal in his poor control. He shows signs of retinopathy and neuropathy. **The question as to his inability to eat and test appropriately while at work has been raised and is difficult for me to specifically indicate whether or not this is contributory at this point in time based on the information or the exam of today.** (Emphasis added)

In an "E" mail of October 11, 2000 Dr. Forman further stated (RX 14):

"Diabetes can have a variable course independent of Mr. Robinson's allegations. **Stress, erratic eating, unpredictable work shifts and exertion each can alter glucose levels**. Smoking directly worsens diabetic complications and alcohol can alter glucose levels. Complications can occur even in well controlled diabetes. I am, therefore, unable to specifically assign causality to Mr. Robinson's claim that work conditions at Electric Boat worsened his diabetic control **WHICH IS POSSIBLE**. (Emphasis added)

As the Employer apparently saw the weakness in Dr. Forman's candid admissions, the Employer then went to Boston and sought out Dr. Hare.

Dr. Hare's opinions have been summarized above and most noteworthy is the doctor's conclusion in his letter to the Employer:

Dr. Hare concludes as follows in his letter to the Employer.

"In summary, Mr. Robinson developed insulin dependent diabetes in 1986. His control was never good, his dietary and self-glucose management was never good and he smoked. These are all risk factors for the development of complications in general and visual complications in particular. The fact that he worked long hours is not an explanation for his complications of diabetes. There is no

evidence that Electric Boat in any way inhibited his ability to follow a diet or monitor his blood glucose levels while at work.[15] On the contrary, they knew he had diabetes and were willing to accommodate him."

Dr. Hare reiterated his opinions at his March 7, 2001 deposition (RX 23 at 4-43) and, in response to intense cross-examination by Claimant's counsel, testified that "diet, insulin and exercise is the holy triad in the control of diabetes," that meal size and meal timing are important factors, that a diabetic such as the Claimant should have a break every two hours, **that "the patients that (he) see(s) that have the most difficulty (in controlling their diabetes) are people who work night shifts"** and that Claimant's work activities did not aggravate his poor diabetes control in any way.[16] (RX 23 at 43-63)(Emphasis added)

Accordingly, in view of the foregoing, I initially note that I will give greater weight to the opinions of Dr. Alessandro, the doctor who is in the best position to opine on Claimant's medical and physical condition and who has been treating him since October 24, 1997 (CX 2), as well as those of consulting physician, Dr. Browning (CX 5),[17] that Claimant's maritime employment aggravated,

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[15] If Dr. Hare had been afforded the benefit of Claimant's testimony at his August 28, 2000 hearing before me, I imagine the doctor would qualify that sentence.

[16]The boldface portion of Dr. Hare's testimony contradicts the doctor's opinion on causation because Claimant worked second shift, and I so find and conclude.

[17]The Board states as follows in footnote 5. "The administrative law judge also stated he was relying on the opinion of Dr. Browning, an orthopedic surgeon who saw claimant for orthopedic problems. Dr. Browning diagnosed claimant with hand-arm vibration syndrome related to his use of power tools and opined that this impairment was made worse by his pre-existing diabetes. Cl. Ex. 11. He did not believe claimant's hand-arm vibration syndrome worsened his diabetes, **Id.** at 25-26, and his opinion thus does not support the administrative law judge's conclusion regarding aggravation."

That last statement by the Board is clearly erroneous as Dr. Browning, a specialist in orthopedics and the hands, who examined Claimant on September 28, concluded that Claimant "has considerable in the way of damage on both the neuromuscular side and the vascular side," that his neuropathy could reasonably be rated at thirty-five (35%) percent of each upper extremity, **that twenty (20%) percent thereof is due to the bilateral hand/arm vibration syndrome and to the diabetes and "that he is going to get progressively worse with increased neuropathy, and the reason**

accelerated and exacerbated his pre-existing diabetes since at least 1986, resulting in diabetic retinopathy, peripheral vascular disease and peripheral neuropathy, as complications thereof, that he tried to continue working as long as he could but finally had to stop working on August 24, 1999 and that Dr. Alessandro has opined that Claimant cannot return to work because of his multiple medical problems. While Claimant's lifestyle has clearly and adversely affected his diabetes, the fact remains that his irregular work schedule, the physical demands of his job, and the stress resulting therefrom, aggravated his pre-existing diabetes, thereby resulting in a new and discrete injury on August 24, 1999, at which time he had to stop working. The Employer had timely notice of such injury and Claimant timely filed for benefits (CX 1) once a dispute arose between the parties, and I so find and conclude.

While Mr. Serpa, Mr. Doucette and Mr. Hickey testified that Claimant and any other diabetic employees could take a medical break without any problems, I simply am not persuaded because Mr. Doucette candidly admitted that he did raise the time card issue with Claimant(and also told Claimant not to inject himself with insulin in the work place) and because Claimant credibly testified that he was reluctant to go to the Yard Hospital or Dispensary because that visit may be recordable as an event to be reported to OSHA or because he may be labeled as a "crybaby" or a wimp. (ALJ EX 7A) If such is not the case, Claimant has been out of work since August 23, 1999 and it would have been a simple matter for the Employer to recall Claimant to return to work at the Quonset Facility, a facility not unionized, unlike its Groton shipyard. It is obvious that the Employer does not desire the services of an employee with those medical needs.[18]

While the Employer tries to minimize the **Electric Boat MTC Shipyard Employee Recognition** a/k/a **the Safety Recognition Program**, the fact remains that that program does exist and Claimant was discouraged from visiting the Yard Hospital, especially with the shipyard downsizing in effect. (**In this regard see** ALJ EX 7A.) As

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for this is his diabetes." (CX 5 - CX 8) Dr. Browning forthrightly, probatively and persuasively reiterated his opinions at his February 3, 2000 deposition. (CX 11) (Emphasis added)

[18]I render no opinion as to whether or not the Employer is in compliance with the Americans With Disabilities Act, especially as Dr. McKee acknowledges awareness of Claimant's diabetic condition.

noted above, Claimant's reluctance to go to the Yard Hospital was a reasonable belief, in my judgment.[19]

This Administrative Law Judge, in concluding that Claimant's pre-existing diabetes, a personal medical condition, was aggravated, accelerated and exacerbated by his working conditions at the Employer's maritime facilities, relies upon and accepts the well-reasoned and well-documented opinions of Dr. Alessandro and Dr. Browning. I also credit the quoted portions of the opinions of Dr. Forman, Dr. McKee (that working first shift enables a worker to better control his diabetes; I also note that Dr. McKee has not been shown any of Dr. Alessandro's records relating to his treatment of the Claimant [RX 17 and 15]); and Dr. Hare (that workers who work night shifts have the most difficulty in controlling their diabetes), Claimant's testimony as to his physically demanding job was corroborated by Mr. Doucette and Mr. Serpa.

Employer's post-remand brief discusses at length certain well-settled principles of workers' compensation law dealing with the concepts of "injury" and "disability," as well as the "but-for" theory as articulated by Professor Larson in his treatise on workers' compensation law, principles with which no-one can disagree. However, while the Employer submits that Claimant's diabetes was not aggravated or accelerated by his working conditions at the shipyard and at Quonset Point, I find and conclude that the physical demands of the job, the erratic work schedule and the resulting stress did, in fact, aggravate, accelerate and exacerbate Claimant's pre-existing diabetes.

Moreover, this case has nothing to do with the "true doubt" rule because the evidence is not "in equipoise" as the preponderance thereof clearly leads to the conclusion that Claimant's diabetes was aggravated, accelerated and exacerbated by his maritime employment.

Furthermore, this case has nothing to do with the so-called "Daubert Rule," a rule that requires the presiding judge to reject evidence that can be described euphemistically as "junk science." **Daubert** does not require that I reject Claimant's medical evidence simply because the Employer's medical expert disagrees with that evidence. Moreover, Employer overlooks footnote 6 of the Board's decision wherein the Board states that "the issue of 'blind application of the treating physician rule' is not before us here."

Employer relies to a considerable on **Gencarelle v. General Dynamics Corp.,** 23 BRBS 13 (CRT) (2d Cir. 1989) and **Amos v.**

[19]I note that the Employer's post-remand brief is silent on this safety program.

Director, OWCP, 32 BRBS 144 (CRT)(9th Cir. 1999). I am familiar with those cases as I was the presiding judge in both of those cases. **Gencarelle** dealt with a condition diagnosed as synovitis of the knee and **Amos** promulgated the treating physician rule in that Circuit, just as the second Circuit did in **Pietrunti**.

In summary, Claimant has established a work-related injury, and disability resulting therefrom, because his maritime employment at Groton and at Quonset Point has aggravated, accelerated and exacerbated his pre-existing diabetes.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, and only on the evidence admitted into evidence herein, I again find and

conclude that Claimant has established that he cannot return to work as an outside machinist. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). The job of an outside machinist is physically-demanding (RX 14) and Dr. Alessandro has opined that Claimant cannot return to work because of his multiple medical problems. I therefore find Claimant has a total disability.

Claimant's injury has not become permanent as he still requires that additional medical care and treatment consistently denied him by the Employer. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock**

Company, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than that presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total disability from August 24, 1999 to date and continuing. Moreover, the issue of permanency has not yet been considered by the District Director. (ALJ EX 2) In this regard, **see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v.**

Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the

employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer, consistently treating Claimant’s medical problem as a personal condition, did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Employer concedes, at page 14 of its post-remand brief, “that Claimant’s cardiac condition is a consequence of the diabetic condition.”

Accordingly, in view of the foregoing, Claimant is entitled to an award of medical benefits for the reasonable, necessary and appropriate medical treatment to monitor and control his diabetes, his diabetic retinopathy, his peripheral vascular disease (**i.e.**,

his bilateral hand/arm vibration syndrome) and his cardiac problems, commencing on October 24, 1997, the date on which he first saw Dr. Alessandro for his poorly controlled diabetes. (CX 2) Such medical care and treatment shall be subject to the provisions of Section 7 of the Act.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (RX 2) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 3(e) of the Act

Section 3(e) of the LHWCA provides:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act.

33 U.S.C. §903(e).

It is now well-established that a claimant can obtain concurrent state and federal awards payable by the same employer for the same injury, so long as the employer receives a credit to avoid double payment to the claimant. See Topic 50.4.1

Section 3(e) provides a statutory credit for state workers' compensation benefits or Jones Act benefits received by employees. This provision is consistent with prior cases holding employers are entitled to a credit under the Act for payments made pursuant to a state award. **Sun Ship, Inc. v. Pennsylvania**, 447 U.S. 715, 12 BRBS 890 (1980); **Calbeck v. Travelers Ins. Co.**, 370 U.S. 114 (1962). **See Darling v. Mobil Oil Corp.**, 864 F.2d 981, 986 (2d Cir. 1989) (state law preempted where it interferes with full execution of federal law); **Le v. Sioux City & New Orleans Terminal Corp.**, 18 BRBS 175 (1986). **Accord Bouchard v. General Dynamics Corp.**, 963 F.2d 541, 543-44 (2d Cir. 1992) (Connecticut law determined to conflict with § 3(e)); **Fontenot v. AWI, Inc.**, 923 F.2d 1127, 1132 n.38 (5th Cir. 1991). **Contra E.P. Paup Co. v. Director, OWCP**, 999 F.2d 1341, 27 BRBS 41, 48 (CRT) (9th Cir. 1993) (the Act does not preempt Washington state law requiring reimbursement of previously

paid state benefits upon award of benefits under federal maritime law).

Section 14(k) of the 1972 LHWCA was changed to Section 14(j) by the 1984 Amendments. Pub. L. No. 98-426, 98 Stat. 1639, 1649, § 13(b). Section 14(j) of the LHWCA provides:

> (j) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. § 914(j).

The purpose of Section 14(j) is to reimburse an employer for the amount of its **advance** payments, where these payments were too generous, for however long it takes, out of **unpaid** compensation found to be due. **Stevedoring Servs. of American v. Eggert**, 953 F.2d 552, 556, 25 BRBS 92, 97 (CRT) (9th Cir.), **cert. denied**, 112 S.Ct. 3056 (1992); **Tibbetts v. Bath Iron Works Corp.**, 10 BRBS 245, 249 (1979); **Nichols v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 710, 712 (1978) (employer's voluntary payments of temporary total disability credited against award of permanent partial compensation). Section 14(j) does not, however, establish a right of repayment or recoupment for an alleged overpayment of compensation. **Ceres Gulf v. Cooper**, 957 F.2d 1199, 1208, 25 BRBS 125, 132 (CRT) (5th Cir. 1992); **Eggert**, 953 F.2d at 557, 25 BRBS at 97 (CRT); **Vitola v. Navy Resale & Servs. Support Office**, 26 BRBS 88, 97 (1992).

Section 14(j) allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. **Balzer v. General Dynamics Corp.**, 22 BRBS 447, 451 (1989), **on recon, aff'd**, 23 BRBS 241 (1990); **Mason v. Baltimore Stevedoring Co.**, 22 BRBS 413, 415 (1989); **Mijangos v. Avondale Shipyards**, 19 BRBS 15, 21 (1986), **rev'd on other grounds**, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991). If the employer pays benefits and intends them as advance payments of compensation, the employer is entitled to a credit under Section 14(j). **Mijangos**, 19 BRBS at 21.

As already noted above, the employer is also entitled to a credit for payments made under a state compensation act. **Garcia v. National Steel & Shipbuilding Co.**, 21 BRBS 314, 317 (1988); **Ferch v. Todd Shipyards Corp.**, 8 BRBS 316, 319 (1978); **Adams v. Parr Richmond Terminal Co.**, 2 BRBS 303, 305 (1975). **See also Lustig v. Todd Shipyards Corp.**, 20 BRBS 207, 212 (1988), **aff'd in part, rev'd in part, Lustig v. U.S. Dept. of Labor**, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989) (employer entitled to credit for proceeds of state workers' compensation settlement but **not** attorney fees or medical liens paid under state workers' compensation act).

However, it is well-settled that the employer is not entitled to a credit for payments made under a non-occupational insurance plan, as those payments are not considered "compensation" for the purposes of Section 14(j). **Pardee v. Army & Air Force Exch. Serv.**, 13 BRBS 1130, 1137 (1981). Because medical expenses are not "compensation," advance payments of compensation may not be credited against awarded medical expenses. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418.423 (1989), **aff'd mem.**, No. 90-4135 (5th Cir. 1991). Interest is also not "compensation" for Section 14(j) purposes. **Castronova v. General Dynamics Corp.**, 20 BRBS 139, 141 (1987). **See also Sproull v. Stevedoring Servs. of America**, 25 BRBS 100, 112 (1991) (holding that interest is not compensation further goal of fully compensating claimant by not allowing employer an offset for its overpayments of disability compensation against interest awarded by the judge).

Moreover, the employer is not entitled to a credit for payments made by a non-occupational sickness and accident carrier, because the employer is not entitled to receive credit for money it never paid. **Mijangos**, 19 BRBS at 21; **Jacomino v. Sun Shipbuilding & Dry Dock Co.**, 9 BRBS 680, 684 (1979); **Pilkington v. Sun Shipbuilding & Dry Dock Co.**, 9 BRBS 473, 480-481 (1978).

Accordingly, the Employer is not entitled to a credit for the payments made to Claimant in 1992 by another entity but is entitled to a credit for the payments to Claimant made by the Employer for Claimant’s hearing loss claim (RX 9), his right shoulder injury (RX 10) and his bilateral hands claim (RX 11) on and after August 24, 1999. Claimant agreed that the Employer was entitled to those credits and I have adopted that stipulation.

Attorney's Fee

Claimant's attorney, having again successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer as a self-insurer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after May 10, 2000, the date of the informal conference, and until July 24, 2001, the date of my initial decision. Services performed prior to that date should be submitted to the District Director for his consideration. This Court also has jurisdiction over legal services rendered and costs incurred between August 22, 2002, the date of the Board’s decision, and the date of this decision on remand.

ORDER

Based upon the foregoing additional Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from August 24, 1999 through the present and continuing based upon an average weekly wage of $651.25, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his hearing loss claim (RX 9), his right shoulder injury (RX 10) and his bilateral hands claim (RX 11) on and after **August 24, 1999.** (Emphasis added) The Employer is also entitled to a credit for that compensation paid to the Claimant as a result of the July 24, 2001 decision issued herein.

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including the medical benefits specifically discussed, approved and awarded herein, commencing on October 24, 1997, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on May 10, 2000 and until July 24, 2001, and between August 22, 2002 and the date of this decision on remand.

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DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts

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